United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

Date: December 8, 1997

Case No. **96 INA 353**

In the Matter of:

BOSS SPORTSWEAR CO., LTD.,
aka GENOVA SPORTSWEAR, INC.,
Employer

on behalf of

YI-MEI CHO,
Alien

Appearance: L. L. Lopez, Esq.., of Bell Gardens, California

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of YI-MEI CHO (Alien) by BOSS SPORTSWEAR CO., LTD., aka GENOVA SPORTSWEAR, INC., (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U. S. C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at San Francisco, California, denied this application, the Employer requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General (1) that there are not sufficient workers who are able, willing, qualified, and available at the place

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

where the alien is to perform such labor at the time of the application; and (2) that the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability at that time and place.[2]

STATEMENT OF THE CASE

The Employer, which trades in the manufacture, distribution, and sales in import and export of sportswear garments, applied for labor certification on behalf of the Alien on December 16, 1995, to fill the position of Fashion Design Coordinator. The position was classified under DOT as Fashion Designer under Occupational Code No. 142.061-018.[3] The Employer stated the duties of the Job to be Performed as follows:

> Coordinates collections and the entire line of clothing for major men's sportswear company so as to project desired

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]**142.061-018 FASHION DESIGNER** (profess. & kin.) alternate titles: clothes designer Designs men's, women's, and children's clothing and accessories: Analyzes fashion trends and predictions, confers with sales and management executives, compares leather, fabrics, and other apparel materials, and integrates findings with personal interests, tastes, and knowledge of design to create new designs for clothing, shoes, handbags, and other accessories. Sketches rough and detailed drawings of apparel and writes specifications describing factors, such as color scheme, construction, and type of material to be used. Confers with and coordinates activities of workers who draw and cut patterns and construct garments to fabricate sample garment. Examines sample garment on and off model and modifies design as necessary to achieve desired effect. May draw pattern for article designed, using measuring and drawing instruments. May cut patterns. May construct sample, using sewing equipment. May arrange for showing of sample garments at sales meetings or fashion shows. May attend fashion and fabric shows to observe new fashions and materials. May be identified according to specific group designed for, such as men, women, or children or areas of specialization, such as sportswear, coats, dresses, suits, lingerie, or swimwear. May design custom garments for clients and be designated Custom Garment Designer (retail trade). May conduct research and design authentic period, country, or social class costumes to be worn by film, television, concert, stage, and other performers and be designated Costume Designer (profess. & kin.). May design, fabricate, repair, and sell leather articles and be designated Leather Crafter (leather prod.). May design, copy, or modify clothing accessories and be designated according to article designed as Handbag Designer (leather prod.); Hat Designer (hat & cap); or Shoe Designer (boot & shoe). GOE: 01.02.03 STRENGTH: L GED: R5 M3 L4 SVP: 7 DLU: 78

> image. Liaison with overseas producers to arrange fashions, styles, fabrics, colors and accessories to achieve appropriate fashion statement.

Employer required two to three years of college with an Associate of Arts Degree in Fashion Design, plus one year of experience in the Job Offered or in a Related Occupation as a Fashion Designer or Assistant Fashion Designer.[4] As other Special Requirements, the Employer specified that the worker must be able to perform duties stated in the description of the Job to be Performed with AFL LOOM'S and Lecture System, and that the worker be Bi-Lingual in English and Mandarin." AF 100. The work was to be performed from 9:00 AM to 5:00 PM. The Employer offered $2,994.00, per month for this forty hour a week position with no overtime. Employer later reported that no U. S. workers applied for the position it advertised.

Notice of Findings. The Notice of Findings (NOF) of July 20, 1995, advised Employer that the Certifying Officer would deny certification, subject to rebuttal. AF 91-98. (1) The CO found that the Employer failed to offer the prevailing wage of $4,512 per month, as required under 20 CFR §§ 656.21 and 656.40. (2) The CO also found that the Employer's requirement of fluency in the Mandarin language violated 20 CFR § 656.21(b)(2)(i)(c) in that it was unduly restrictive. (3) The CO finally found that the Employer's job description failed to state its actual minimum requirements for employment, citing 20 CFR § 656.21(b)(5).[5] The CO explained further that Employer's requirement of one year of experience in the job offered or in a related occupation did not appear to meet its true minimum requirements, as the Alien did not meet these criteria at the time she was hired and was either trained or provided the necessary learning opportunities by the Employer after she was employed. AF 96.

Rebuttal. Employer's August 4, 1995, Rebuttal incorporated Employer's June 7, 1995, letter to the State employment agency

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[4]The Alien graduated high school with training in dress making. Her college major leading to an Associate in Arts certificate was in International Trade; and she took other Associate in Arts certificate courses in Fashion Design from 1991 through 1993. She worked in part time jobs for a period of eight months from April to October 1992 as a Fashion Designer and as a Production Room Assistant. The Employer added in AF 168 that it had employed the Alien from December 1992 to February 1994 "Full Time" as Assistant to Fashion Designer, performing the following duties: "Assist fashion designer in computer design, sketching, line sheet, presentation board ... prepare detail sheets for styles for fashion, fit, fabric, quality, and construction." (This verbatim transcription of the addendum to the position description is as stated in AF 168 without alteration, including Employer's punctuation.)

[5]This finding was sufficient to encompass Employer's restrictive requirement of experience in AFL LOOM'S and LECTURE SYSTEM software.

and disputed the findings in the NOF. AF 81-85, 167-168.[6] The Employer contended that the position at issue is a "Fashion Design Co-ordinator" that does not encompass the design of clothes, citing DOT Occupational Codes 185.157-010, 781.361-016, and 142.061-018. The Employer argued that the wage offered exceeds the prevailing wage for this position. Employer then asserted that it had produced sufficient documentation to prove that its foreign language requirement was a business necessity, as opposed to a preference.

Final Determination. The Final Determination issued by the CO on August 28, 1995, denied certification on grounds that the Employer had failed to rebut the NOF findings that (1) the wage offered was below the prevailing wage, (2) the requirement of fluency in the Mandarin language was restrictive, and (3) the job offer failed to state the minimum requirements for this position. In addressing the Alien's qualifications the CO found inter alia that the Employer had failed to demonstrate that the position of Assistant to the Fashion Designer was sufficiently dissimilar to the position of Fashion Designer. Certification was denied on grounds that the Employer failed to sustain its burden of proof in rebutting any of the deficiencies noted in the NOF. AF 79-80.

Appeal. On October 2, 1995, the Employer appealed to BALCA. to review and evaluate its rebuttal and the denial of certification. Employer contends that the wage offered, $2,994 per month, does meet the prevailing wage; that its requirement of fluency in the Mandarin language is not a restrictive requirement, and that the experience required is the minimum necessary to perform the job offered. AF 05-08.

DISCUSSION

It is a well settled rule of general application that an employer seeking the benefit of a special provision of the Immigration and Nationality Act under which a foreign worker is to be certified to take a job within the United States has the burden of proof when it appeals from a Certifying Officer's denial of certification. **Cathay Carpet Mills, Inc., d/b/a The Walnut Company,** 87 INA 161 (Dec.7, 1988) (en banc). For this reason, an employer challenging the CO's determination that the

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[6]In its Rebuttal the Employer further alleged that the CO's NOF is "arbitrary and captious, totally unfounded and unsupported by the administrative record in this case, and contrary to applicable statutes and regulations as aforesaid, being nothing more than a bad faith attempt to subvert the law and impugn the legitimate, stated needs of the employer, all, beyond and outside the actual scope and authority of the Certifying Officer in this case." AF 82 (Spelling and punctuation as in the original). As these and other allegations of misconduct asserted in Employer's Rebuttal were abandoned in its Appeal, they will not be discussed. See AF 82-84. (AF 86-90 duplicates AF 81-85.)

job requirements are restrictive bears the burden of establishing that the Certifying Officer's finding is in error. **William Flint Painting & Cleaning Company,** 90 INA 256 (Dec. 9, 1992).

20 CFR § 656.21(b)(2)(i)(C) provides that the position shall not include a requirement for a language other than English unless that requirement is adequately documented as arising from business necessity. **Information Industries**, 88 INA 082 (Feb. 9, 1989)(en banc). As the **Information Industries** standard has developed in relation to foreign language requirements, the first prong requires proof that the employer's business includes clients, co-workers or contractors who speak a foreign language, and a showing that a material percentage of employer's business involves this foreign language. Proof under the second prong focuses on whether the employee's job duties require communication or reading in a foreign language, and requires employer to establish that use of the foreign language is essential for the reasonable performance of the job duties of the position at issue. Hence, the employer must not only show that a significant percentage of clients communicate primarily in a language other than English, but must also prove that use of that foreign language is essential for performance of the job duties in a reasonable manner.[7]

The first prong of **Information Industries** may be met when a significant share of the employer's business is conducted in a foreign language. **Raul Garcia, M.D.**, 89 INA 211 (Feb. 4, 1991); **Construction and Investment Corp., dba Efficient Air**, 88 INA 055 (Apr. 24, 1989) (en banc).[8] Business necessity is not proven under the second prong, however, where employer's evidence failed to support its assertions that a high level of communication or interaction in the foreign language is required in the position offered.[9]

Simply proving that a significant percentage of employer's

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[7]The new evidence added in the Employer's Appeal cannot be considered under 20 CFR §§ 656.24(b)(4), 656.27(c). **Cappriccio's Restaurant,** 90 INA 480 (Jan.7, 1992).

[8]See also **Coker's Pedigreed Seed Co.**, 88 INA 048 (Apr. 19, 1989) (en banc); and **Details Sportswear**, 90 INA 025 (Nov. 30, 1990).

[9]It is particularly relevant that business necessity was not proven in a case where the telephone bills employer offered failed to demonstrate that a major part of its business was conducted in the foreign language. **Advanced Digital Corporation**, 90 INA 137 (May 21, 1991); **Newport Pacific Realty & Investment Corp.**, 88 INA 444 (Aug. 30, 1989). In other cases BALCA held that a foreign language is not a business necessity where other employees could communicate in the language at issue. **H. Stern Jewelers,** 89 INA 089 (Jan. 19, 1990); **Spuhl Anderson Machine Co.**, 87 INA 564 (May 18, 1989).

clientele speaks the foreign language is not sufficient to establish business necessity, if there is no relationship between the clientele's use of foreign language and job to be performed. In **Splashware Company**, 90 INA 038 (Nov. 26, 1990), for example, while a significant number of the employer's clients required the use of a foreign language, the employer did not show why the employee would need to speak that language to perform the job duties assigned by the employer.[10] Finally, an employer's preference that a language other than English be used at the workplace cannot support business necessity for a foreign language requirement where use of the language is not essential for the reasonable performance of the job duties. **Linda Hwang,** 89 INA 360 (Nov. 16, 1990).[11]

Conclusion. In this case the NOF and the Final Determination indicate that the CO considered the evidence of record supporting the business necessity for fluency in Mandarin Chinese in the conduct of Employer's business under 20 CFR § 656.21(b)(2)(i)(c), and concluded that the Employer failed to sustain its burden of proof that this was not a restrictive requirement or that it was a customary requirement of the position at issue. The panel has closely examined Employer's Rebuttal to find evidence that would support its proof of business necessity and has found none. For this reason it is concluded that the evidence of record supported the CO's finding that Employer's job requirement of fluency in Mandarin Chinese is restrictive and violates the provisions of 20 CFR § 656.21(b)(2)(i)(c).

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

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[10]Also see **Best Roofing Co., Inc.**, 88-INA-125 (Dec. 20, 1988).

[11]Employer's case cannot be proven by its unsupported assertions. **Lamplighter Travel Tours,** 90 INA 038 (Nov. 28, 1990). Also, an employer's proof cannot be established by the mere assertions of counsel to explain why the worker must write and speak Mandarin Chinese. **Splashware Company**, 90 INA 038 (Nov. 26, 1990).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.